



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
and STATE OF CALIFORNIA,

Plaintiffs,

MONTROSE CHEMICAL CORPORATION
OF CALIFORNIA, et al.

Defendants.

AND RELATED CLAIMS.

No. CV 90-3122 AAH

ORDER GRANTING
PLAINTIFFS' MOTION FOR
ENTRY OF SECOND CONSENT
DECREE

FACTS AND BACKGROUND

In this action, plaintiffs United States of America and the State of California ("Plaintiffs") seek entry of the second consent decree (the "Proposed Decree") resulting from the early settlement process that this Court established at its initial hearing in this matter on March 18, 1991. In early 1992, Plaintiffs lodged the first consent decree in this matter (the "Potlach Settlement"), which called for payment of \$12 million by defendants Potlach Corporation and Simpson Paper Company. This Court granted entry of the Potlach Settlement on May 19, 1992.

The Proposed Decree now before the Court has been entered into by Plaintiffs and defendant County Sanitation District No. 2

THIS COURT HAS GRANTED ENTRY
AS REQUIRED BY RULE 77(d)

1 of Los Angeles County ("LACSD") and certain third-party defendant
2 local governmental entities ("Local Governmental Entities").
3 LACSD and the Local Governmental Entities are alleged to have
4 owned or used sanitation systems and stormwater runoff systems
5 that discharged wastewater to the ocean, or to have otherwise
6 engaged in activities (such as mosquito abatement) which may have
7 resulted in the discharge of hazardous substances such as DDT
8 into the environment.

9 Plaintiffs had previously negotiated a proposed consent
10 decree with LACSD and certain other sanitation districts in 1990.
11 At that time, however, the Court expressed concern that the facts
12 behind the proposed settlement remained unclear.¹ Plaintiffs
13 subsequently withdrew this proposed consent decree at the request
14 of LACSD to permit attempts to negotiate a settlement that would
15 include a broader group of the Local Governmental Entities.

16 The Proposed Decree now before the Court is for \$45.7
17 million. If this Court approves the Proposed Decree, LACSD and
18 all 150 of the Local Governmental Entities will be removed from
19 this action, greatly simplifying this litigation. The Proposed
20 Decree calls for two substantial cash payments upon approval, one
21 for \$9.3 million for natural resource damages, and one for \$3.5
22 million for response costs at the Montrose Chemical NPL Site
23 ("Montrose Site").² Further payments totalling \$33.6 million

24 ¹To remedy this, the Court appointed Special Master Harry V.
25 Peetris on March 18, 1991 to supervise all non-dispositive pretrial
26 proceedings and to conduct and supervise settlement negotiations.

27 ²The Montrose Chemical NPL Site is defined at paragraph 6.F of
28 the Proposed Decree.

1 for natural resource damages would be made over the next four
2 years. Solely at the discretion of Plaintiffs, up to \$8.0
3 million of that money could be provided in the form of in-kind
4 services. The Local Governmental Entities would also release any
5 claims for natural resource damages or for response costs
6 associated with the Montrose Site.

7 In return, the Local Governmental Entities would receive
8 covenants not to sue for both claims asserted by Plaintiffs in
9 this matter. Under the Proposed Decree, the Local Governmental
10 Entities could not be sued in relation to either the Plaintiffs'
11 natural resource damage claim, or the United State's claim for
12 response costs associated with the Montrose Site. The covenants
13 not to sue are subject to limited "reopener" provisions, which
14 would permit Plaintiffs to seek additional natural resource or
15 response costs damages to the extent that such claims were based
16 on new information or unknown conditions. In addition, the
17 natural resource trustees (the "Trustees") are given discretion
18 under the Proposed Decree to decide how to allocate the damages.
19 Under the terms of the Proposed Decree, however, the Trustees
20 would exercise their discretion in compliance with the provisions
21 of CERCLA.

22 As with the Potlatch Settlement, there is opposition to
23 entry of the Proposed Decree from the non-settling defendants,
24 Montrose Chemical Corporation of California, et. al. (the "DDT
25 Defendants") and Westinghouse Electric Corporation
26 ("Westinghouse").
27
28

1 **II. NON-SETTLING DEFENDANTS' OBJECTIONS TO CONSENT DECREE**

2
3 The DDT Defendants and Westinghouse challenge both the
4 substantive and procedural fairness of the proposed settlement.
5 Their objections are focused on five areas: 1) the proper role
6 of this Court; 2) Plaintiffs' rationale for settlement; 3) the
7 adequacy of the factual record; 4) the Proposed Decree's
8 consistency with CERCLA; and 5) the Proposed Decree's limitation
9 on additional damages resulting from implementation of secondary
10 treatment.

11 12 **A. Role of the Court**

13
14 The DDT Defendants question the amount of deference this
15 Court should give to Plaintiffs' evaluation of the facts and
16 rationale for settlement. In its approval of the Potlach
17 settlement, this Court gave Plaintiffs' apportionment of
18 liability great deference in the interest of early settlement.
19 United States v. Montrose Chem. Corp. of Cal., 793 F. Supp. 237,
20 240 (C.D. Cal. 1992).

21 In addition, Westinghouse questions the amount of deference
22 this Court should give Special Master Peetris' recommendation
23 (the "Recommendation"). As with the Potlach Settlement, the
24 Special Master has recommended that this Court grant Plaintiffs'
25 motion to enter the Proposed Decree.

1 **B. Plaintiffs' Rationale for Settlement**

2
3 The DDT Defendants and Westinghouse question the Plaintiffs'
4 rationale for settlement, which took into account a variety of
5 factors, with volumetric contribution the major factor for the
6 industrial defendants. With regard to LACSD and the Local
7 Governmental Entities, Plaintiffs took into consideration (1) the
8 risks and costs of litigation; (2) the involvement of LACSD in
9 early efforts to control the discharge of DDT and PCBs; (3) the
10 public service nature of the settling parties' sewer collection;
11 and (4) the fact that LACSD and the Local Governmental Entities
12 were willing to engage in early settlement negotiations.

13
14 **C. The Adequacy of the Factual Record**

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16 In questioning the adequacy of the factual record, the DDT
17 Defendants and Westinghouse argue two points. First, they argue
18 that the Proposed Decree's provision for contribution protection
19 to the settling defendants should make the Proposed Decree
20 subject to greater scrutiny by this Court with respect to the
21 facts of the litigation.

22 Second, they claim that the facts supporting the Plaintiffs'
23 rationale for settlement are absent or unreliable or wrong. In
24 support of this argument, the non-settling defendants first argue
25 that New York v. SCA Services, Inc., ____ F. Supp. ____ (S.D.N.Y.
26 March 1, 1993) represents a new trend in natural resource damages
27 cases and provides a basis for this Court to depart from the

1 approach it took when it approved the Potlach Settlement. SCA,
2 however, is distinguishable from this case, since the settlors
3 there were responsible for 90 percent of the contaminant damage,
4 yet were only required to pay a sum equal to about one-third of
5 the response costs. The Court's approval of the Proposed Decree
6 here would not result in such a manifestly unjust outcome. In
7 addition, the DDT Defendants and Westinghouse assert that
8 Plaintiffs lack sufficient information regarding the discharge of
9 hazardous substances by the settling parties. In support of
10 their factual analysis, Plaintiffs cite interviews with
11 representatives of the settling parties, conducted under the
12 supervision of the Special Master, as well as public records.

13 Further, the DDT Defendants assert that Plaintiffs'
14 estimates of DDT discharge from the Montrose Site are erroneous,
15 and that there are numerous other sources of the DDT
16 contamination. This argument was also unsuccessfully raised in
17 opposition to the Potlach Settlement. Plaintiffs contend that
18 the DDT Defendants' claims regarding "actual" DDT discharge are
19 still imprecise and unsubstantiated. Finally, Westinghouse
20 complains it has had difficulty scheduling depositions of its
21 former employees. Plaintiffs respond, however, that there is no
22 reason to believe that these witnesses will be determinative of
23 the practices employed by Westinghouse at its facility.

24
25 **D. Consistency with CERCLA: Settlement Funds and Response Costs**
26

27 The DDT Defendants argue that the Proposed Decree is
28

1 inconsistent with CERCLA in two respects: 1) the provision for
2 the use of settlement funds violates CERCLA; and 2) CERCLA bars a
3 certain geographic area on the Montrose site from inclusion
4 within the scope of the covenant not to sue for natural resource
5 damages.

6 **1. Settlement Funds**

7 The DDT Defendants assert that the Proposed Decree expands the
8 Trustees' authority and discretion to allocate the settlement
9 funds beyond what they can properly do under CERCLA. The DDT
10 Defendants raised this argument unsuccessfully against the
11 Potlach Settlement. The language of the Proposed Decree
12 specifies that the Trustee's discretion must be exercised in
13 accordance with the provisions of CERCLA.

14 **2. Response Costs**

15 The non-settling parties further assert that with respect to
16 one area of the Montrose Site, namely the stormwater pathway from
17 the site to its ocean outlet ("Stormwater Pathway"), there may be
18 a bar as to the suit at this time for any residual resource
19 damages associated with that particular area of the site. The
20 non-settling parties suggest that this Court should reject the
21 Proposed Decree due to this potential bar to the suit.

22 The Stormwater Pathway is an overlapping geographic area.
23 That is, it is a subject of both the Plaintiffs' natural resource
24 damage claim and the claim for response costs incurred with
25 respect to the Montrose Site. Section 113(g)(1) of CERCLA bars
26 the filing of an action with respect to a facility listed on the
27 National Priorities List prior to the selection of a remedial

1 action at that facility. 42 U.S.C. §9613(g)(1). Because the
2 Montrose Site is such a facility, and because no remedial action
3 has yet been selected at the Montrose Site, this restriction may
4 apply to the Stormwater Pathway. Thus, this prerequisite may
5 potentially bar suit at this time for any residual damages
6 associated with the Stormwater Pathway. Of course, the bar would
7 not preclude the suit forever, but simply until there was a
8 remedial action selected for the Montrose Site. Plaintiffs
9 correctly point out, however, that nothing precludes the parties
10 from settling claims even when they are potential claims.

11
12 **E. Limitation on Additional Damages Resulting from**
13 **Implementation of Secondary Treatment**

14 The DDT defendants object to a provision in the Proposed
15 Decree which limits the ability of Plaintiffs to seek further
16 recovery from the Local Governmental Entities for natural
17 resource damages that might arise from future release of
18 hazardous substances. That limitation applies, however, only to
19 the extent that the Local Governmental Entities can demonstrate
20 that the contaminant releases result from the institution of full
21 secondary treatment of the wastewater flowing through a sole
22 outlet, namely the White's Point Outfall. This limitation may
23 put the non-settling defendants at some additional risk if the
24 non-settlers are jointly and severally liable for the damages.
25 Plaintiffs correctly argue, however, that this is a litigation
26 risk inherent in the DDT Defendants' decision not participating
27 in early settlement.

IV. DISCUSSION

Before initially approving a the Proposed Decree in accordance with CERCLA, this Court must satisfy itself that the settlement is fair, reasonable, and consistent with the purposes of CERCLA. Montrose, 793 F. Supp. at 240 (citations omitted). In reviewing the Proposed Decree, the Court is guided by the following factors: (1) the relative costs and benefits of litigating this case under CERCLA; (2) the risks of establishing liability on the part of the settlors; (3) the good faith efforts and adversarial relationship of the negotiators; (4) the reasonableness of the settlement as compared to the settlor's potential volumetric contribution; (5) the ability of the settlors to withstand a greater judgement; and (6) the effect of settlement on the public interest as expressed in CERCLA. Id. at 240 (citing United States v. Rohm & Haas Company, 721 F.Supp. 666, 687 (D.N.J. 1989)).

This Court must also consider CERCLA's primary goal to encourage early settlement. It would be contrary to this goal to require, prior to approval of the Proposed Decree, precise information about the relative culpability of different defendants and the extent of the total harm caused. Id. (citing United States v. Cannons Engineering, 899 F.2d 79, 88 (1st Cir. 1990)). Furthermore, because of this goal, courts have given the government's apportionment of liability great deference. Id. In spite of these considerations, however, the Court must still scrutinize the adequacy of the settlement process. In order to

1 grant Plaintiffs' motion to enter the Proposed Decree, this Court
2 must find the Proposed Decree to be both (1) the product of a
3 procedurally fair process; and (2) substantively fair to the
4 various parties in light of a reasonable reading of the facts in
5 this case.

6
7 **A. Procedural Fairness**
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9 Pursuant to the Court's order, Special Master Peetris has
10 been directly involved in all settlement activities. The Special
11 Master held settlement conferences with each set of defendants
12 and ordered that the substance of the discussions be kept
13 confidential. The Special Master has submitted his
14 Recommendation to the Court indicating; and conclusively showing,
15 that negotiations between Plaintiffs, LACSD and the Local
16 Governmental Entities were made in good faith, and that the
17 Proposed Decree is procedurally and substantively fair.
18 Furthermore, the Special Master has assured the Court that all
19 negotiations were between experienced counsel, adversarial in
20 nature and held at arms length.

21
22 **B. Substantive Fairness**
23

24 As already discussed above, the DDT Defendants challenge the
25 substantive fairness of the Proposed Decree. The \$45.7 million
26 proposed settlement figure, however, appears to be reasonable and
27 fair. Significantly, the figure was not arrived at in an

1 arbitrary manner. The Plaintiffs have explained in detail the
2 methodology that they used in arriving at this figure. So long
3 as the method selected by the Government appears to be
4 reasonable, the Court should not interfere with the Governments
5 determinations, particularly when buttressed by the
6 Recommendation of the Special Master. Id. at 241 (citing Cannons
7 Engineering, 899 F.2d at 87). Furthermore, the Courts have made
8 it more than clear that proposed settlements should not be
9 subjected to precision-seeking, nit-picking line-item scrutiny.
10 Id. (citing United States v. Rohm & Haas Co., 721 F. Supp. 666,
11 687 (D.N.J. 1989))

12
13 **V. CONCLUSION**
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15 The Court, following the Recommendation of the Special
16 Master, finds and concludes that the process of settlement
17 and the settlement itself were and are fair and reasonable.
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Based on this finding, the Court makes the following:

ORDER

1. Plaintiffs' Motion for Entry of Proposed Consent Decree is GRANTED.

2. Lead Counsel for the United States shall serve copies of this Order on all counsel of record for Plaintiffs and Defendants.

DATED: 4/26/13



A. ANDREW HAUK
SENIOR UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE BY MAIL

I hereby declare that I am an employee of Lasky, Haas, Cohler & Munter, Professional Corporation, whose business address is 505 Sansome Street, 12th Floor, San Francisco, California, 94111, that I am over the age of 18 years, that I am not a party to this cause. On July 9, 1993, I served Civil Appeals Docketing Statement upon each person listed on the attached Liaison Counsel Service List, and upon the following additional persons:

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by placing true copies thereof in sealed envelopes addressed to said persons, postage thereon fully prepaid, in the United States Mail at San Francisco, California on July 9, 1993.

I declare under penalty of perjury that each of the foregoing statements is true and correct. Executed this 9th day of July, 1993, at San Francisco, California.

Terra W. Loftin

**UNITED STATES AND STATE OF CALIFORNIA V. MONTROSE CHEMICAL
CORPORATION OF CALIFORNIA, et al., CV 90-3122 AAH (JRx)**

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